IN THE HIGH COURT OF NEW ZEALAND
AUCKLAND REGISTRY

I TE KŌTI MATUA O AOTEAROA
TĀMAKI MAKAURAU ROHE

CIV-2016-404-765
[2019] NZHC 404

BETWEEN	CULLEN GROUP LIMITED Plaintiff
AND	THE COMMISSIONER OF INLAND REVENUE Defendant

Hearing:	27-31 August, 3, 6, 10 and 11 September 2018
Appearances:	D J Cooper, J W A Johnson and N G Lawrence for Plaintiff G M Coumbe QC, A B Goosen and M K Nicholson for Defendant
Judgment:	12 March 2019

JUDGMENT OF PALMER J

This judgment was delivered by me on 12 March 2019 at 10.00 a.m.
pursuant to r 11.5 of the High Court Rules 2016.

Registrar/Deputy Registrar

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Counsel/Solicitors:
David Cooper, Barrister, Auckland
Gillian Coumbe QC, Auckland
Wynn Williams, Auckland
Crown Law, Wellington

Summary

[1] Mr Eric Watson moved from New Zealand to the United Kingdom in 2002. He restructured his business affairs so his shares in Cullen Investments Ltd (CIL) were replaced by loans owed by Cullen Group Ltd (Cullen Group) to conduit companies in the Cayman Islands, Modena Holdings Ltd (Modena) and Mayfair Equity Ltd (Mayfair). Modena and Mayfair were not, legally, "associated persons" with Cullen Group, so the arrangement fell within the provisions of the Approved Issuer Levy (AIL) tax regime. Accordingly, Cullen Group paid AIL at two per cent of the $397 million of interest it paid Modena and Mayfair, rather than Non-Resident Withholding Tax (NRWT) at 15 per cent.

[2] The Commissioner of Inland Revenue assessed Cullen Group as having avoided $59.5 million of NRWT while it paid $8 million in AIL. She assessed the net tax owing as $51.5 million. Use of money interest on that amount came to an additional $60.5 million as at 27 August 2018. Penalties have not yet been quantified. Cullen Group challenges the Commissioner's assessment. It says the arrangement restructured Mr Watson's affairs in order to achieve certainty about his change of tax residency from New Zealand to the United Kingdom and to plan for application of the United Kingdom's laws governing remittance of foreign-sourced income.

[3] Parliament enacted the AIL regime with the objective of encouraging investment in New Zealand, by reducing the cost of New Zealand residents borrowing from non-residents. The arrangement here introduced no new funds into New Zealand. It restructured shares in one New Zealand company (CIL) into loans to another New Zealand company (Cullen Group), which were assigned to overseas entities (Modena and Mayfair) in form but not substance. Mr Watson retained a high degree of control over the relevant entities and was on both sides of the loans. I do not consider the arrangement was within the contemplation and purpose of Parliament in enacting the AIL regime. It had a more than merely incidental purpose or effect of altering the incidence of tax. It was a tax avoidance arrangement and void against the Commissioner. The Commissioner counteracted the tax advantage lawfully and was not time barred in doing so. I dismiss Cullen Group's challenge. Cullen Group is liable for the $51.5 million of tax plus use of money interest and penalties accordingly.

What happened?

Moving tax residency

[4] There appears to be no material dispute between the parties about the facts. In mid-2002, perhaps in May, Mr Watson moved from New Zealand to the United Kingdom with his son and his son's mother. He sold his personal assets and effects, including art and vehicles, and his Takapuna property, resigned his New Zealand-based clubs and associations, closed some bank accounts and cancelled credit cards; though his home may not have been sold until later.

[5] Mr Watson was concerned to ensure his "permanent place of abode", for tax purposes, changed from New Zealand to the United Kingdom. I accept that, in making such a move, it is common for a high net worth individual to seek to disestablish New Zealand tax residency, and plan remittance of assets and income to the United Kingdom accordingly. That could involve using off-shore entities to hold assets, as it did here.

The relevant entities

[6] Mr Watson was at the centre of a web of entities relevant to this case:

(a) **Cullen Investments Ltd** was incorporated in 1995 as Blue Star Capital Ltd. Mr Watson held the shares personally. Between 1995 and 2002, Mr Watson realised some of his personal investments and lent the proceeds of around $98 million to CIL. In September 2002, Mr Watson, Mr Maurice Kidd and Mr Philip Newland were directors of CIL. Mr Martin Goldfinch became a director in December 2002.

(b) **Modena** and **Mayfair** were incorporated in the Cayman Islands on 9 October 2002. All the shares in Modena and Mayfair were owned by Chartered Trust Services Ltd (CTSL) as corporate trustee of the Modena Trust:

(i) The **Modena Trust** was settled on 1 November 2002 by Mr Watson. He could not appoint trustees but could appoint and

remove beneficiaries other than himself and his relatives. Its only non-charity discretionary beneficiary was the River Group Ltd.

(ii) **CTSL** was a professional trustee services company, incorporated through a Cayman Islands provider, **Close Brothers**. Close Brothers provided director, trustee and governance services for Modena, Mayfair and the Modena Trust.

(iii) The **River Group Ltd** was incorporated on 31 October 2002. Its directors were Mr Archer, Mr Goldfinch and Mr Newland. Its shares were held by Elizabeth Equities Ltd, as trustee of the Tower Trust.

1. Mr Watson was settlor, appointor and a discretionary beneficiary of the **Tower Trust**. As at 21 October 2002, its trustees were Mr Watson, Mr Kidd, Mr Strowger and Mr Newland before Elizabeth Equities Ltd became trustee from 22 December 2003.

2. **Elizabeth Equities Ltd** was incorporated on 13 May 2003. Its shares were held by the Cullen Business Trust Ltd (CBTL) as trustee of the Cullen Business Trust.

(c) **Cullen Group** was incorporated on 31 October 2002. Its initial directors were Mr Watson, Mr Newland, Mr Goldfinch and Mr Les Archer. Its shares were owned by Victoria Equities Ltd (VEL) as sole corporate trustee of the Valley Trust:

(i) **The Valley Trust** was also settled on 31 October 2002 by Mr Watson's mother. Mr Watson was the appointor and had the power to appoint and remove trustees and beneficiaries and to veto proposed amendments. He was the sole final beneficiary

of the Valley Trust and, for the first few years, the sole named and non-charity discretionary beneficiary.

(ii) **VEL** was incorporated on 25 June 2002. Its initial directors were Mr Watson, Mr Newland, Mr Goldfinch and Mr Archer, the same as the directors of Cullen Group. Its shares were initially owned by Mr Archer. From 10 October 2003, its shares were held by CBTL as trustee of the Cullen Business Trust:

1. The trustees of the **Cullen Business Trust** (initially known as the Cullen Trust) were initially Mr Watson, Mr Kidd, Mr Strowger and Mr Newland. On 10 October 2003, they were replaced as trustees by CBTL. Mr Watson was the settlor, appointor and a discretionary beneficiary of the Cullen Business Trust. He had the power to appoint and remove trustees.

2. **CBTL** was incorporated in July 2003. Mr Watson was a director. Its shareholders were Mr Watson, Mr Kidd, Mr Strowger and Mr Newland, as trustees of the **Gulf Trust**. Mr Watson was the settlor, appointor and discretionary beneficiary of the Gulf Trust.

The transaction

[7] On 13 November 2002, Mr Watson restructured his ownership of CIL. Mr Campbell Rose, then at Russell McVeagh, and from 2012 at Deloitte, was a key architect of the transaction.[1] The key steps, all timed for 13 November 2002, were:

(a) Mr Watson sold his shares in CIL to Cullen Group, at a (rounded) value of $193 million, being $291 million less his previous $98 million shareholder advances.[2] The sale was conditional on CIL selling its

[1] Notes of Evidence [NOE] 28/3–6.
[2] Precisely, these figures were: $291,347,276; $192,986,181; and $98,361,095. I use the rounded numbers in the judgment, consistently with Cullen Group's submissions. See Agreement for Sale and Purchase of Shares in Cullen Investments Limited, 13 November 2002, Common Bundle (CB) 1/6.

shares in Medical Holdings Ltd to Mr Watson and on CIL selling its shares in Vonelle Holdings Ltd to Maintenance Ltd which was owned by Mr Watson.[3]

(b) Cullen Group's purchase of the CIL shares from Mr Watson was funded by a vendor loan from Mr Watson of $193 million (Loan A).[4] Mr Watson also lent Cullen Group $98 million (Loan B) which Cullen Group on-lent to CIL so that CIL could repay Mr Watson's shareholder advance of that amount.[5]

(c) Mr Watson assigned his rights under Loans A and B to the two conduit companies, Modena and Mayfair, respectively.[6] Mr Watson made back-to-back loans of $193 million (Modena Loan) and $98 million (Mayfair Loan) to each of them to fund their payment to him of consideration for those respective assignments in return for security over all property owned by Modena and Mayfair respectively.

[8] The position as at 13 November 2002 was represented in an appendix to Cullen Group's statement of claim in this proceeding in the diagram on the following page.[7]

[9] As Mr Cooper, for Cullen Group, summarises it, "[t]he result was therefore that CIL was owned by [Cullen Group] which owed money to Modena/Mayfair which owed money to Mr Watson.[8] Effectively, instead of Mr Watson owning the shares in CIL, he held loans for the same value to CIL's owner, Cullen Group, through Modena and Mayfair. He had exchanged equity for debt. I accept the purchase price of $291 million was at market rate, based on an independent Ernst & Young valuation, and that, as the Commissioner accepted, the valuation was on an arms' length basis.[9]

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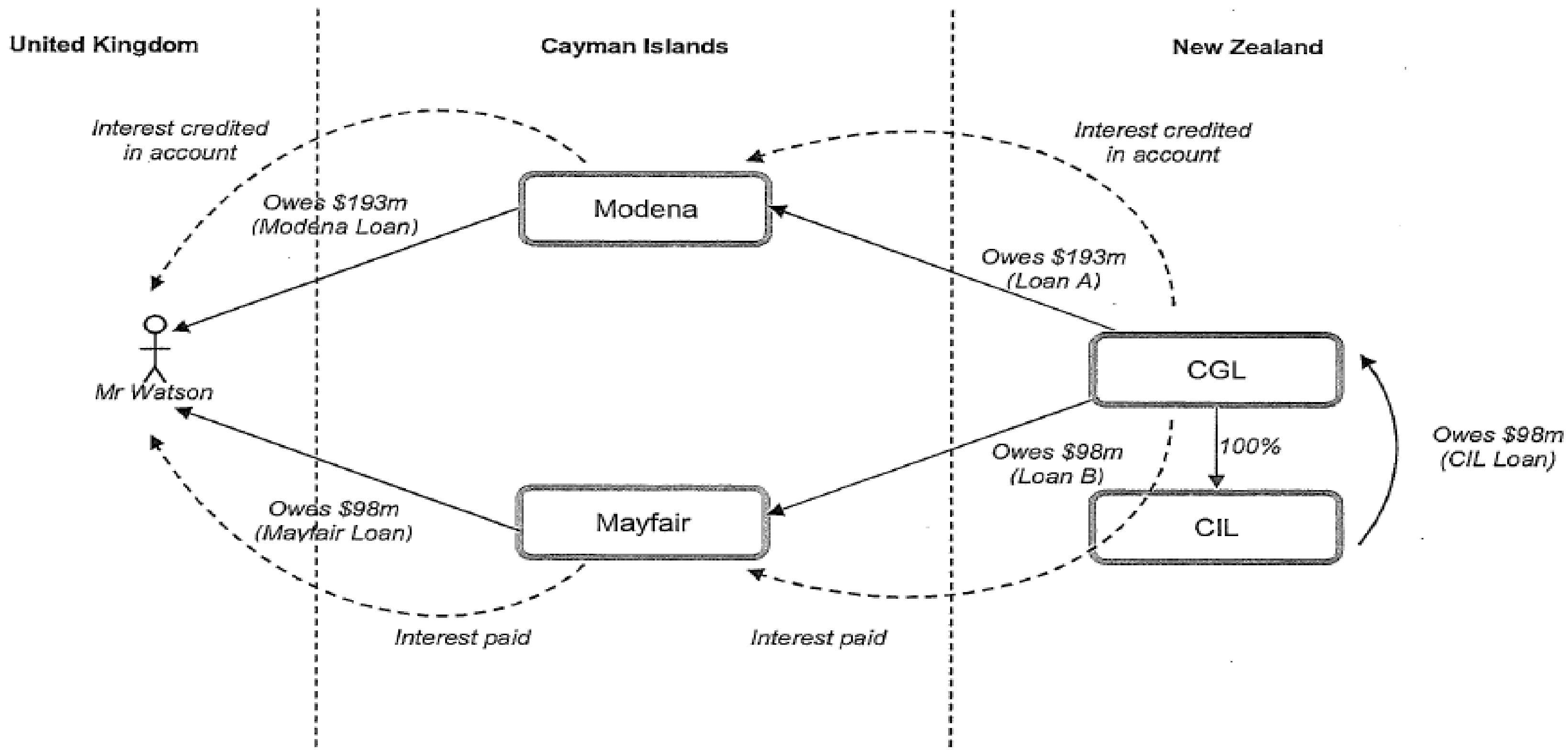
3 CB 1/9.
4 Loan Agreement, 13 November 2002, CB 1/21 [Loan A Agreement].
5 Loan Agreement, 13 November 2002, CB 1/26 [Loan B Agreement]; Loan Agreement, 13 November 2002, CB 1/31.
6 Deed of Assignment of Debt, 13 November 2002, CB 1/48; Deed of Assignment of Debt, 13 November 2002, CB 1/67.
7 Statement of Claim, 15 April 2016, at Appendix B.
8 Plaintiff's closing submissions, 11 September 2018, [Plaintiff's Closing] at [8].
9 Commissioner's Statement of Position, 20 February 2013, CB6/2981 [SOP], at [17].

APPENDIX B

Position as at 13 November 2002



[10] The terms of Loans A and B from Mr Watson to Cullen Group (which he assigned to Modena and Mayfair) included:

(a) Modena or Mayfair could only request repayment of the loan from Cullen Group if Mr Watson had previously issued a letter of demand for repayment of the corresponding Modena or Mayfair Loan, or any part of it. Modena's or Mayfair's demand was required to be contemporaneous with, and not to exceed the amount specified in, Mr Watson's demand.

(b) Interest was payable at 16 per cent per annum, calculated six-monthly. I accept the interest rate was struck so as to, and did, reflect that of an arms' length arrangement.[10]

(c) Cullen Group was not able to assign or transfer its rights or obligations under the loans.[11] Mr Watson, as lender, could assign his rights as lender under the loans.[12] Any other lender, including Modena and Mayfair, could only assign them back to Mr Watson or with his agreement.

(d) Cullen Group was required to register each loan with the Commissioner as a registered security for AIL purposes and to make the relevant payment of AIL to the Commissioner.[13]

[11] The only substantive difference between Loans A and B was that the interest on Loan A was credited in account to the lender until the principal was repaid in full whereas the interest on Loan B accrued and was paid out. The terms of Mr Watson's Modena and Mayfair Loans largely mirrored Loans A and B. The terms of Cullen Group's on-lending of Loan B to CIL were similar to those of Loan B, though the interest rate term was different.

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[10] Memorandum by Mr Goldfinch, 7 November 2002, CB 2/861; Mr Shane Hussey, Brief of Evidence, 29 August 2018, at [89]. NOE 169/5-8, 171/17-19 (Hagen).

[11] Clauses 9.1 to Loan A Agreement, above n 4, and Loan B Agreement, above n 5.

[12] Clauses 9.2 to Loan A Agreement, above n 4, and Loan B Agreement, above n 5.

[13] Clauses 3.2 to Loan A Agreement, above n 4, and Loan B Agreement, above n 5.

[12] Mr Watson did not have a formal ownership relationship with Modena or Mayfair. But Modena and Mayfair could only make demand on their loans to Cullen Group if Mr Watson made demand on his loans to them. Furthermore, Modena and Mayfair entered a Memorandum of Understanding with CIL on 9 December 2002 under which their directors delegated to CIL employees the power to effect electronic transfers of funds from Modena's and Mayfair's BNZ accounts to Mr Watson's BNZ accounts, subject to certain approvals and procedures.[14] As Mr Rose explained in an email on 21 November 2002, there was to be "as little hands-on involvement as possible" from Modena and Mayfair.[15] In a memorandum of 18 December 2002, Mr Rose confirmed cashflows between bank accounts were to be effected in practice by CIL employees.[16] And, when CIL sought the consent of third party financiers to implementation of the 13 November 2002 transaction, CIL stated "[t]he change is an internal reorganisation and has no practical effect on the control of Cullen and its group companies".[17] As Mr Cooper, for Cullen Group, summarises it, "[a]lthough there were intermediaries (Modena and Mayfair) Mr Watson was the ultimate lender and could control whether and when the loans were ultimately to be called up".[18]

[13] The expert evidence runs in the same direction. Mr John Hagen's opinion, looking at the substance of the transactions, is that Mr Watson remained "in control of the group and the flow of funding at all times".[19] Professor Choudhry's opinion was "all entities involved are part of the same controlling network and not operating as independent parties in any way".[20] Mr Hussey, in reply, agreed the structure allowed Mr Watson economic control.[21]

[14] Given all this, it is not surprising that Mr Cooper, for Cullen Group, acknowledges Mr Watson retained "some influence over all the relevant entities".[22] I find Mr Watson had a high level of control over the relevant entities and was on both

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14 Memorandum of Understanding, CB 3/1108.
15 Email from Campbell Rose to Maxine Rawlins, 21 November 2002, CB 2/989; Email from Campbell Rose to Maxine Rawlins, 27 November 2002, CB 2/1066.
16 Memorandum from Campbell Rose to Les Archer, William Gibson and others, 18 December 2002, CB 3/1135 [Rose Memorandum].
17 Letter from CIL to Reesby and Company Ltd, 12 September 2002, CB 1/291.
18 Plaintiff's opening submissions, 20 August 2018 [Plaintiff's Opening], at [120].
19 John Hagen, Brief of Evidence, 16 July 2018 [Hagen], at [81].
20 Moorad Choudhry, Brief of Evidence, 16 July 2018 [Choudhry], at [63].
21 Shane Hussey, Brief of Evidence in Reply, 29 August 2018, [Hussey Reply], at [101].
22 Plaintiff's Closing, above n 8, at [9].

sides of the loan transactions. In summary, the arrangement replaced Mr Watson's shares in a New Zealand company (CIL) with loans to another New Zealand company (Cullen Group), which were assigned to overseas entities (Modena and Mayfair) in form, but not substance.

Subsequent developments

[15] On five occasions in 2002, 2003 and 2005, Mr Watson demanded part-repayments of principal from Mayfair, amounting to $8.375 million.[23] Under Loan B, Mayfair demanded the same repayments, at the same times, from Cullen Group.

[16] Mr Watson subsequently made 12 additional loans to Modena totalling $54.5 million.[24] Modena made corresponding mirror loans to Cullen Group of the same amounts (with one exception) and at the same times. The terms of these loans were similar to Loan A. Most of these were made after corresponding amounts of interest, totalling $56.99 million, were paid by Cullen Group to Mayfair and by Mayfair to Mr Watson.[25] Mr Cooper, for Cullen Group, submits Mr Watson made these additional loans to Modena using funds he did not use from the receipt of interest from Mayfair.[26]

[17] As at 30 November 2008, Cullen Group owed Modena, and Modena owed Mr Watson, some $587.5 million of principal and interest.[27]

Unwinding

[18] On 30 November 2008 the Modena Loan aspect of the arrangement was unwound, and on 24 and 25 March 2010 the Mayfair Loan aspect was unwound, as follows:

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[23] Letters of demand, CB3/1146, CB3/1155, CB3/1262, CB3/1282 and CB3/1526.

[24] Cullen Group's SOP, 21 December 2012, CB 6/2925 at [2.61]; Statement of Claim, above n 7, at [66].

[25] Statement of Defence at [70]; Statement in Reply at [23].

[26] Plaintiff's Opening, above n 18, at [179].

[27] Specifically, $587,536,236.63.

(a) Mr Watson made demand for repayment in full of each of his loans, including interest, to Modena and Mayfair of $587.5 million and $140.9 million respectively.[28]

(b) Modena and Mayfair assigned to Mr Watson what each was owed by Cullen Group under Loans A and B i.e. $587.5 million and $140.9 million respectively, for which Mr Watson made demand for payment on Cullen Group.[29]

(c) Cullen Group entered with Mr Watson deeds setting-off of what it owed Mr Watson in return for him subscribing for non-voting redeemable preference shares issued by Cullen Group, that were immediately redeemable at the holder's option, to the value of $587.5 million and $140.9 million respectively with no dividend being payable.[30]

(d) Mr Watson then transferred the preference shares to Novatrust Ltd, trustee of the Summit Trust. To fund that, Novatrust entered loan agreements with Mr Watson for a total of $728.4 million ($587.5 + $140.9 million) with the shares in Cullen Group used as security.

  (i) **Novatrust Ltd** was a professional trustee company registered in Jersey.

  (ii) The Protector of the **Summit Trust** was Ms Lisabeth Style, a CIL employee. The Summit Trust had, as discretionary beneficiaries, Mr Watson and Elizabeth Equities Ltd as trustee of the Tower Trust.

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28 Notice of Demand, 30 November 2008, CB 4/2038.

29 Deed of Assignment, 30 November 2008, CB 4/2043; Notice of Demand, 30 November 2008, CB 4/2032.

30 Deed of Set-Off, 30 November 2008, CB 4/2069; Subscription Agreement, 30 November 2008, CB 4/2059; Subscription Agreement, 24 March 2010, CB 5/2318; Subscription Agreement, 25 March 2010, CB 5/2465.

(e) Modena was wound up on 4 November 2009 and Mayfair was wound up on 29 November 2010. The Modena Trust was terminated on 26 October 2010.

The tax

[19] The day after the 13 November 2002 transaction, as required under the loan agreements, Cullen Group applied for status as an "approved issuer" for the purposes of the AIL regime and applied to register its loans from Modena and Mayfair as registered securities. Those applications were confirmed by the Commissioner on 22 November 2002. From March 2003 to November 2008, under the AIL regime, Cullen Group paid AIL of two per cent per annum on the $397 million of interest it paid, or credited in account, to Modena and Mayfair, amounting to just over $8 million.

[20] Cullen Group made income tax returns but, except for dividend income of $12.6 million received from CIL in 2005, did not return any income. It claimed its interest expenses from the loans from Modena and Mayfair as deductions and tax losses, some $108 million of which was transferred to other Cullen Group companies by way of subvention payments and loss offsets from 2003 to 2009.

[21] In 2010, the Commissioner assessed Cullen Group as liable for NRWT on the $397 million of interest, at 15 per cent, amounting to around $59.5 million.[31] The Commissioner offset that by the $8 million of AIL, at two per cent, it had paid from 31 March 2003 to 30 November 2008.[32] The resulting tax liability is around $51.5 million.[33] That assessment is what Cullen Group challenges in this case. As at 27 August 2018, use of money interest on the $51.5 million came to $60.5 million. Penalties have not yet been quantified.

[22] The Commissioner also suggests the overall effect of Cullen Group's tax avoidance was to reduce its income tax obligations, through subvention payments and

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31 Statement of Claim, above n 7, at [70]. The precise figures are $396,988,991.67 and $59,548, 348.77.

32 At [64]. The precise figure is $8,052,221.39.

33 The precise figure is $51,496,127.38.

loss offsets, by $108 million. Cullen Group disputes there was any material income tax reduction and that was not part of the Commissioner's assessment at issue here.

The trial

[23] The trial took nine days over three weeks in August and September 2018. The breaks in timing were due to the availability of overseas witnesses. Cullen Group called four witnesses, three of them expert witnesses:

(a) Mr William Gibson, a senior executive of CIL involved in the 13 November 2002 transaction;

(b) Mr Shane Hussey, an expert witness in accounting;

(c) Mr Murray Brewer, an expert witness in tax accounting; and

(d) Mr Edward Powles, an expert witness in United Kingdom tax law.

[24] The Commissioner called three expert witnesses:

(a) Professor Moorad Choudhry, an expert witness in finance;

(b) Mr John Hagen, an expert witness in accounting; and

(c) Mr Malcolm Gammie QC, an expert witness in United Kingdom tax law.

[25] At the beginning of trial, on 27 August 2018, I heard objections by the Commissioner to evidence to be given by two of Cullen Group's witnesses, Mr Hussey and Mr Brewer. I ruled on the objections on 28 August 2018.[34] In summary, I ruled that Mr Hussey's evidence should respond to the positions of the Commissioner and Cullen Group directly rather than to reports of experts exchanged by the parties during the tax disputes process. I ruled Mr Brewer's proposed evidence about the legal effect of a Double Tax Agreement on the New Zealand withholding tax rate was legal

[34] Ruling No 1, 28 August 2018.

submission and was not to be given as evidence. I allowed Mr Brewer to give evidence about the steps a high net worth individual might be expected to take to ensure he was not tax-resident in New Zealand and indicated I would assess its admissibility in issuing judgment, in the context of assessing the parties' submissions about anti-avoidance law. Mr Hussey's and Mr Brewer's evidence was led accordingly. I consider Mr Brewer's evidence about the steps expected to be taken regarding tax-residency is admissible.

Tax avoidance law

Tax dispute process

[26] The Tax Administration Act 1994 (TAA) sets out the process by which disputes between taxpayers and the Commissioner about tax liability are resolved. The Commissioner issues an assessment, which the taxpayer may dispute by way of a notice of proposed adjustment (NOPA) to which the Commissioner may respond by a notice of response (NOR). If the dispute is not resolved between the parties the Commissioner issues a disclosure notice and the taxpayer issues a statement of position (SOP) to which the Commissioner responds with her own SOP. If the dispute is not resolved by Inland Revenue's internal adjudication process, the taxpayer may challenge the Commissioner's assessment in the Taxation Review Authority (TRA) or, as here, the High Court.

[27] Section 89M(13) of the TAA allows the parties to agree to additional information being added to a SOP. Section 138G provides, unless allowed by the Court, the parties may only raise the issues and propositions of law disclosed in their SOPs in the later challenge process. But, as the Court of Appeal held in *Commissioner of Inland Revenue v Zentrum Holdings Ltd,* the parties are not held to pre-assessment positions.[35] The Court may, on application, allow an applicant to raise new propositions of law or new issues if satisfied the applicant could not, with due diligence, have discerned them at the time of delivering the SOP and, their raising is necessary to avoid manifest injustice.

[35] *Commissioner of Inland Revenue v Zentrum Holdings Ltd* [2007] 1 NZLR 145 (CA).

[28] To succeed in a challenge under s 138P, the taxpayer must prove, on the balance of probabilities, the Commissioner's assessment was excessive by a specific amount or direct the Commissioner to make such an assessment. The Court may confirm, cancel or vary an assessment.

Tax avoidance law

[29] The general approach to construing specific tax provisions and the general anti-avoidance provision in New Zealand tax law is now well-settled. Section BG 1 of the Income Tax Act 2004 (ITA) is the general anti-avoidance provision in relation to income tax. It is relevant here because s NG 17(2) provides all provisions of the ITA apply as if NRWT is income tax. Section BG 1 states:

> **BG 1 Tax avoidance**
>
> *Avoidance arrangement void*
>
> (1) A tax avoidance arrangement is void as against the Commissioner for income tax purposes.
>
> *Reconstruction*
>
> (2) Under Part G (Avoidance and non-market transactions), the Commissioner may counteract a tax advantage that a person has obtained from or under a tax avoidance arrangement.

[30] More informatively, s OB 1 contains the following relevant definitions:

> **tax avoidance arrangement** means an arrangement, whether entered into by the person affected by the arrangement or by another person, that directly or indirectly—
>
> (a) has tax avoidance as its purpose or effect; or
>
> (b) has tax avoidance as 1 of its purposes or effects, whether or not any other purpose or effect is referable to ordinary business or family dealings, if the purpose or effect is not merely incidental
>
> **tax avoidance** includes—
>
> (a) directly or indirectly altering the incidence of any income tax:
>
> (b) directly or indirectly relieving a person from liability to pay income tax or from a potential or prospective liability to future income tax:
>
> (c) directly or indirectly avoiding, postponing, or reducing any liability to income tax or any potential or prospective liability to future income tax

> **arrangement** means an agreement, contract, plan, or understanding (whether enforceable or unenforceable), including all steps and transactions by which it is carried into effect

[31] The leading authority on the application of s BG 1 is the judgment of the majority of the Supreme Court in *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* (*Ben Nevis*).[36] Grounded firmly in the statutory language, the Court set out the approach for determining whether and when the way a specific provision is deployed crosses the lines and turns a permissible arrangement into a tax avoidance arrangement.[37] As relevant to this case, and bearing in mind the burden of proof is on the taxpayer, there are three requirements for there to be tax avoidance:

(a) There is an arrangement which uses, and falls within, specific tax provisions.[38]

(b) Viewed in light of the arrangement as a whole, the taxpayer has used the specific provisions in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provisions.[39]

(c) The arrangement has a purpose or effect, that is more than merely incidental, of directly or indirectly altering the incidence of income tax.[40]

[32] Whether there is an arrangement, and what it is, is informed by the definition of arrangement in s OB 1, which is broad. The parties do not materially disagree on what the arrangement was here.

[33] Whether an arrangement falls within specific tax provisions is determined, as with any other statute, "primarily by their ordinary meaning, as established through

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36 *Ben Nevis Forestry Ventures Ltd v Commissioner of Inland Revenue* [2008] NZSC 115, [2009] 2 NZLR 289 [*Ben Nevis*].
37 At [104].
38 At [105]–[107].
39 At [107].
40 At [113]–[114].

their text in the light of their specific purpose", in accordance with s 5 of the Interpretation Act 1999.[41]

[34] The Court in *Ben Nevis* concluded "[t]he ultimate question is whether the impugned arrangement, viewed in a commercially and economically realistic way, makes use of the specific provision in a manner that is consistent with Parliament's purpose".[42] The Court indicated the following may be taken into account in that assessment, depending on the particular facts and considering the commercial reality and economic effect of the use of specific provisions, not just purely legal considerations:[43]

(a) the manner in which the arrangement is carried out;

(b) the role of all relevant parties and their relationship with the taxpayer;

(c) the economic and commercial effect of documents and transactions;

(d) the duration of the arrangement;

(e) the nature and extent of the financial consequences for the taxpayer;

(f) the combination of various elements in the arrangement; and

(g) whether the arrangement is structured so the taxpayer gains the benefits of the specific provision in an "artificial or contrived" way (characterised as a "classic indicator" of a use outside Parliamentary contemplation).

[35] In relation to the more than "merely incidental" requirement, the Supreme Court observed "[i]t will rarely be the case that the use of a specific provision in a manner which is outside parliamentary contemplation could result in the tax avoidance

41 At [103]. See *Terminals (NZ) Ltd v Comptroller of Customs* [2013] NZSC 139, [2014] 1 NZLR 121 at [39].
42 At [109].
43 At [108]–[109].

purpose or effect of the arrangement being merely incidental".[44] The "purpose or effect" of a tax avoidance arrangement is assessed objectively, irrespective of the subjective motives of the person who made it.[45] The Court must focus "objectively on features of the arrangements involved, without being distracted by intuitive subjective impressions of the morality of what taxation advisers have set up".[46] In *Alesco New Zealand Ltd v Commissioner of Inland Revenue*, the Court of Appeal held a tax avoidance purpose will offend s BG 1 "unless it naturally attaches to or is subordinate or subsidiary to a concurrent legitimate purpose or effect".[47] It held "[i]dentification of a business purpose will not necessarily protect a transaction from scrutiny where tax avoidance is viewed 'as a significant or actuating purpose which had been pursued as a goal in itself'."[48]

[36] If a tax avoidance arrangement does exist, s BG 1(2) empowers the Commissioner to counteract the taxpayer's tax advantage under part G of the Act. I explain this further in the context of issue five below.

Tax avoidance case law

[37] Some examples of application of the *Ben Nevis* approach to tax avoidance law are:

(a) In *Ben Nevis,* the Supreme Court found an arrangement involving tax deductions, for expenditure on a licence premium and insurance premium that was not incurred in commercial or real terms, was not within Parliament's purpose and contemplation when it authorised deductions of the kinds in question.[49] It dismissed the taxpayer's challenge to the Commissioner assessing the deductions as void under s BG 1.

44 At [114].
45 *Glenharrow Holdings Ltd v Commissioner of Inland Revenue* [2008] NZSC 116, [2009] 2 NZLR 359 at [35]–[40].
46 *Ben Nevis,* above n 36, at [102].
47 *Alesco New Zealand Ltd v Commissioner of Inland Revenue* [2013] NZCA 40, [2013] 2 NZLR 175 [*Alesco*] at [30].
48 At [30].
49 At [119], [147], [156].

(b) In *Penny v Commissioner of Inland Revenue*, the Supreme Court found the structure used by the taxpayers, of transferring their orthopaedic practices to companies owned by their family trusts, was entirely lawful and unremarkable.[50] But those companies' payment to them of artificially low salaries meant they suffered no loss of income while obtaining a reduction in tax liability as if they had.[51] It dismissed the taxpayers' challenge to the Commissioner treating their arrangements as void under s BG 1.

(c) In *Alesco New Zealand Ltd v Commissioner of Inland Revenue,* the Court of Appeal held the taxpayer sought the advantage of tax deductions "totally disproportionate to the economic burden" of interest payments, in a manner outside Parliamentary contemplation.[52] It dismissed the taxpayer's challenge.

(d) In *Vinelight Nominees Ltd v Commissioner of Inland Revenue,* the Court of Appeal found an artificial transaction involving payment of AIL, rather than NRWT, had the more than incidental purpose of avoiding tax.[53] I refer to this case in more detail below. For the moment, it suffices to say there was no change of control in the relevant company, but interest was newly charged on existing borrowings, and at a non-commercial rate.[54] The Court dismissed the taxpayer's challenge to the Commissioner's counteracting of the tax advantage by assessing the unpaid NRWT under s BG 1.

The issues

[38] I apply the law of tax avoidance to the facts of this case by analysing six issues:

(a) What was the arrangement?

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50 *Penny v Commissioner of Inland Revenue* [2011] NZSC 95, [2012] 1 NZLR 433 at [33].
51 At [47].
52 *Alesco*, above n 47, at [113].
53 *Vinelight Nominees Ltd v Commissioner of Inland Revenue* [2013] NZCA 655, (2013) 26 NZTC ¶21-055 [*Vinelight (CA)*] at [60]–[68].
54 At [66].

(b) What specific tax provisions were used?

(c) Were the specific tax provisions used in a way which cannot have been within Parliament's contemplation?

(d) Was altering the incidence of tax a merely incidental purpose or effect?

(e) Did the Commissioner lawfully counteract the tax advantage?

(f) Is the Commissioner's assessment time-barred?

Issue 1 What was the arrangement?

[39] The Commissioner pleads, and at trial Cullen Group accepted,[55] that there was an arrangement, for the purposes of tax avoidance law, comprising the following steps:[56]

(a) the incorporation of Cullen Group on 31 October 2002 with its shares being held by VEL;

(b) the sale by Mr Watson of his 15,000 ordinary shares in CIL to Cullen Group on 13 November 2002 and the loan from Mr Watson to Cullen Group to enable Cullen Group to fund the purchase of CIL shares from Mr Watson;

(c) the settlement of the Valley Trust on 31 October 2002 and the incorporation of VEL on 25 June 2002 (the corporate trustee of the Valley Trust);

(d) the incorporation of CBTL on 8 July 2003 as the corporate trustee of the Cullen Business Trust (which is the shareholder of VEL);

55 Plaintiff's Closing, above n 8, at [17].
56 Statement of Defence, 31 May 2016, at [71.3].

(e) the assignment of Loan A and Loan B by Mr Watson to Modena and Mayfair by deeds of assignment dated 13 November 2002;

(f) the registration of Modena and Mayfair in the Cayman Islands with CTSL owning the shares as trustee of the Modena Trust, and the incorporation of River Group Ltd on 31 October 2002;

(g) the subsequent agreements including the loan agreement dated 13 March 2003 between Cullen Group and Modena and the Deed of Amendment in Relation to Loan Agreement dated 12 November 2003;

(h) Cullen Group applying for AIL status and Cullen Group paying AIL and filing AIL returns;

(i) the registration by Cullen Group of Loan A and Loan B as two separate variable securities for the purpose of Part 6B of the Stamp and Cheque Duties Act 1971; and

(j) Modena and Mayfair charging, and Cullen Group paying, interest on Loan A and Loan B.

[40] The Commissioner also pleaded "all other steps and transactions by which the Arrangement was carried into effect" were part of the arrangement. Cullen Group does not accept that. Mr Cooper, for Cullen Group, acknowledges assignment of the loans to Modena and Mayfair constituted steps undertaken as part of one planned transaction. But he submits the arrangement, as defined, does not include Mr Watson's migration to the United Kingdom, nor the repayment of the loans and issue of redeemable preference shares in 2008 and 2010. Mr Cooper acknowledges the 2008 and 2010 transactions show Mr Watson had a degree of control over the entities but objects they are not relevant to the purpose or effect of the arrangement put in place in 2002.[57] This judgment does not depend on the aspects to which Mr Cooper objects.

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57 Plaintiff's Closing, above n 8, at [19]-[20].

Issue 2: What specific tax provisions were used?

[41] The parties agree the arrangement used, and fell within, the specific tax provisions of the ITA and the Stamp and Cheque Duties Act 1971 [SCD], in relation to NRWT and AIL. The parties agree the relevant provisions are those of the ITA 2004, unless otherwise specified. There is dispute between the parties about whether, and if so the extent to which, the specific provisions concerning tax residence and thin capitalisation were an animating force of the arrangement. For convenience, I summarise their effect here too.

Non-Resident Withholding Tax and the Approved Issuer Levy

[42] In summary, NRWT is imposed at 15 per cent on interest (and dividends and royalties) paid by a New Zealand borrower to a non-resident. Alternatively, the AIL regime recognises that non-resident lenders usually require New Zealand borrowers to "gross up" interest payments to cover NRWT. Later, I discuss the purpose of the AIL regime further. Under the AIL regime, a New Zealand borrower who is an "approved issuer" may pay AIL at two per cent on interest paid, in relation to a "registered security", to someone who is not an "associated person".

[43] Under the ITA and SCD, the AIL regime works as follows:

(a) "Any person to whom money is, has been, or may in future be lent" may apply to the Commissioner to be an approved issuer for the purposes of the NRWT rules (s NG 5, ITA). Where (and when) the Commissioner has received such an application, the applicant is deemed to be an approved issuer, unless the Commissioner declines the application (s NG 6). Accordingly, s OB 1 defines "approved issuer" as meaning "a person for whom an approval under section NG 6 … is in force".

(b) An approved issuer may apply to the Commissioner for registration of any transaction or class of transactions "involving money lent to that approved issuer" as registered securities (s 86G, SCD). On application,

the Commissioner must register the relevant transaction or class of transactions and notify the approved issuer (s 86H, SCD);

(c) Interest is treated as being paid by an approved issuer in respect of a registered security only where, and to the extent, the issuer pays AIL on the leviable value of the security at the time of the interest payment, at two per cent (ss 86I and 86J, SCD; s NG 1(3), ITA).

(d) The NRWT rules apply to "interest or investment society dividends … that are derived by a person who is not resident in New Zealand, not being a person who is engaged in business in New Zealand through a fixed establishment in New Zealand" (s NG 1(2)(b), ITA).

(e) NRWT is set at zero per cent for "interest … paid by an approved issuer in respect of a registered security and derived by a person who is not an associated person of the approved issuer". (s NG 2(1)(b)(i), ITA).

[44] Section OD 7 of the ITA 1994, which was in force at the date of the transaction on 13 November 2002, defines "associated person" for the purposes of the AIL rules as follows:[58]

> **OD 7 Defining when 2 persons are associated persons**
>
> (1) For the purposes of this Act, unless the context otherwise requires, at any time associated persons or persons associated with each other are–
>
> (a) Two companies where at the time there is a group of persons–
>
> (i) The aggregate of whose voting interests in each company is equal to or exceeds 50%; or
>
> (ii) In any case where at the time a market value circumstance exists in respect of either company, the aggregate of whose market value interests in each company is equal to or exceeds 50%; or

[58] Cullen Group referred to s OD 7 of the ITA 2004 in its Plaintiff's Opening, above n 18, at [68], and Plaintiff's Closing, above n 8, at [43]. As noted, the parties agreed to use the 2004 Act except as they otherwise specify. The Commissioner otherwise specifies in relation to s OD 7, in her Opening of 31 August 2018, at [5.4], and Closing, 10 September 2018, at [27]. Cullen Group relies on the Commissioner's pleading in its SOP there are "no material differences" between the ITA 1994, 2004 and 2007. I do not consider the differences make any difference to the result of this judgment.

(iii) Who have control of both companies by any other means whatsoever; or

(b) A company and any person (other than a company) where at the time–

(i) The person has a voting interest in the company equal to or exceeding 25%; or

(ii) In any case where at the time a market value circumstance exists in respect of the company, the person has a market value interest in the company equal to or exceeding 25%; or

(c) Two persons who are at the time relatives; or

(d) A partnership and any person who is–

(i) At the time a partner in the partnership; or

(ii) A person associated at the time (under any of the other provisions of this subsection) with a partner in the partnership.

(2) For the purposes of subsection (1)(a) and (b), where any person (referred to in this subsection as the **nominee**) holds any rights at any time,–

(a) On behalf of or to the order of another person; or

(b) Being a relative at the time of another person,–

the rights shall be deemed to be held at the time by the other person as well as by the nominee, as if the nominee, the other person, and all other such nominees of the other person were at the time a single person.

(3) *Repealed.*

(4) Section OD 7(1)(c) does not apply for the purpose of sections HH 3C and HH 3D.

[45] The Commissioner accepts in her statement of defence that Cullen Group was not, legally, an "associated person" of Modena or Mayfair, and did not control them, for the purposes of s OD 7 of the ITA.[59] I raised a question at trial with both parties as to whether the relevant entities might, nevertheless, be "associated persons" under s OD 7(1)(a)(iii), which includes where there is a group of persons "who have control

59 Statement of Defence at [94]. See also: SOP, above n 9, CB6/2981 at [116]–[117], [198]; Addendum to SOP, 16 August 2013, CB6/3059; Commissioner's Notice of Response, 8 September 2010, CB5/2724 at [62].

of both companies by any other means whatsoever". That definition appeared to me potentially to encompass control in terms of economic substance as well as control in law, despite suggestions to the contrary in: obiter comments about a similar definition for GST purposes in *Staithes Drive Development Ltd v Commissioner of Inland Revenue*;[60] a Canadian case;[61] and an Inland Revenue Tax Information Bulletin.[62] However, I accept the Commissioner is bound by her pleadings, which she has not sought to vary, so the issue is not in dispute, was not argued before me and does not arise for my decision in this case.

Tax residence and remittance

[46] Section OE 1 of the ITA provides a natural person is "resident in New Zealand" if they have a "permanent place of abode" in New Zealand (irrespective of whether they have a permanent place of abode outside New Zealand). Permanent place of abode is not defined in the ITA. As explained by the Commissioner in *Public Information Bulletin No 180* from 1989, which was still in force in 2002, it was determined by considering all of a person's connections with New Zealand.[63]

[47] The United Kingdom's law concerning tax residence, and remittance planning, is largely agreed upon by the parties' UK tax experts, Mr Powles and Mr Gammie. In 2002, there was no comprehensive statutory test of tax residency in the UK. But a person spending at least 183 days a year in the UK was tax resident there, for the purposes of UK tax law. So was a person who averaged 91 or more days in the UK over a four-year period.

[48] A "non-domiciled resident" of the UK was allowed to pay UK tax only on income generated in the UK as well as on income generated outside the UK during UK residence but subsequently remitted to the UK. Accordingly, such taxpayers had incentives to ensure money remitted to the UK was "clean capital", which did not represent income generated during a period of UK tax residence. This was usually

60 *Staithes Drive Development Ltd v Commissioner of Inland Revenue* [2015] NZHC 2593, (2015) 27 NZTC ¶22-028 [*Staithes Drive*] at [93]–[102].
61 *Duha Printers (Western) Ltd v Canada* [1998] 1 SCR 795 at 815-816.
62 Inland Revenue Department *Tax Information Bulletin* Vol 2 No 3 Appendix, Controlled Foreign Companies (October 1990) at [4.26].
63 Inland Revenue, *Public Information Bulletin No 180* (June 1989) at [3.12].

done by setting up a segregated fund of clean capital outside the UK, to minimise UK income and inheritance taxes, such as in a tax haven (or "tax neutral jurisdiction" as Cullen Group called them at trial).

Issue 3: Were the specific tax provisions used in a way which cannot have been within Parliament's contemplation?

Submissions

[49] Mr Cooper submits, for Cullen Group, *Ben Nevis* requires that whether a specific provision is used in a way which cannot have been within Parliament's contemplation must be firmly grounded in the statutory language.[64] Accordingly, he submits the Commissioner: (a) takes an incorrect, overly broad, approach to statutory interpretation; and (b) makes an incorrect reading of the legislative history.

[50] First, Mr Cooper submits that, although interpretation should be purposive and can rely on extrinsic material, the Commissioner's approach rewrites rather than interprets the statutory provisions. He submits the statutory language does not justify requirements there be: "overseas investment in New Zealand"; "new investment" into New Zealand; parties which are not subject to common control/ownership; or loans on arms' length terms. In relation to the common control/ownership element, he submits Parliament's definition of "associated person" suggests it did not intend that phrase would also apply to other relationships of "ownership/control" which fall outside the definition.

[51] Second, Mr Cooper traverses the legislative history of the AIL regime and submits it does not support the Commissioner's policy objectives. He submits the legislative history of the "associated persons" definition shows it was intended to focus on the relationship between the parties rather than on the nature of the transaction between them. He submits the TRA's reasoning about common ownership and control in *Vinelight,* which supports the Commissioner's position, was not adopted by either the High Court or the Court of Appeal judgment in *Vinelight*.[65] He submits the High

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64 *Ben Nevis,* above n 36, at [104].

65 *Vinelight (CA),* above n 53; *Vinelight Nominees Ltd v Commissioner of Inland Revenue* [2012] NZHC 3306, (2012) 25 NZTC ¶20-155 [*Vinelight* (*HC)*] at [122]–[124]; *Case 11/2011* [2011] NZTRA 07, (2011) 25 NZTC ¶1-011 [*Vinelight* (*TRA)*] at [317].

Court's obiter comments in *Staithes Drive* on artificiality of the arrangement there do not support the Commissioner's position.[66]

[52] Mr Cooper also submits artificiality and contrivance are relevant where they cause the alteration in the incidence of tax and are thereby the means by which avoidance occurs. But here, he submits the factors said by the Commissioner to be artificial and contrived, judged against arms' length standards, are to be expected in the context of privately held assets. So, he submits:

(a) vendor finance with a related company/trust structure are common and commercially rational;

(b) the economic terms of the transaction were not artificial, the interposition of Modena and Mayfair did not alter the economic substance of the arrangement or the incidence of tax;

(c) there were rational and legitimate tax residency and remittance planning reasons to include Modena and Mayfair in the transaction which was not necessary, but prudent;

(d) the use of tax havens is not uncommon and made no difference to the incidence of tax in New Zealand or the United Kingdom;

(e) any circularity in the payments was superficial rather than substantive and circularity is both common in commercial transactions and infrequently enlightening in relation to tax avoidance.

(f) *Vinelight's* features of artificiality and contrivance are absent in this case and justify distinguishing it: the overall rationale of the transactions; the non-commerciality of the interest rate; the contrived management fee; the sole purpose being tax avoidance; and the existence of backdated and inaccurate documents.

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66 *Staithes Drive,* above n 60.

[53] Ms Coumbe QC, for the Commissioner, relying on *Vinelight,* submits the purposes of the AIL and NRWT regimes, and the associated persons rules under s OD 7, are:

(a) to encourage investment into New Zealand by non-residents;

(b) to enable New Zealand borrowers to reduce their interest costs when borrowing funds from non-associated non-resident lenders who might otherwise "gross up" the interest charged so the New Zealand resident borrower bears the NRWT;

(c) to offer the concession only where the parties are not associated and arms' length dealing is more likely, not where they have a particularly high level of common ownership and control; and

(d) to discourage tax avoidance and evasion relating to NRWT.

[54] Accordingly, Ms Coumbe submits Parliament's intention is the concessionary AIL rate is only available to "genuine overseas third party lenders" where there is not a high degree of common control and ownership. She submits this arrangement, viewed as a whole in a commercially and economically realistic way, cannot have been intended by Parliament to benefit from the concessionary two per cent rate of AIL and a zero-rate of NRWT because:

(a) there was no genuine overseas investment from a genuine non-resident lender;

(b) the parties were subject to a high degree of common control and ownership by Mr Watson in substance even though they were not associated in legal form, and there were non-arms' length transactions;

(c) many features of the loans and transactions are commercially unorthodox, as particularly illustrated by their unwinding, and exhibit circularity, artificiality, contrivance and pretence that are hallmarks of tax avoidance according to *Ben Nevis* and are unnecessarily complex.

[55] Ms Coumbe disputes Cullen Group's submission that Parliament must be taken to have contemplated arrangements falling outside s OD 7 qualifying for AIL. She submits that would mean the general anti-avoidance provision in s BG 1 is overridden or read down by the specific provisions in s OD 7, contrary to *Ben Nevis*. She submits the High Court and Court of Appeal rejected that argument in *Vinelight.*

The difference between purposive interpretation of specific provisions and application of the general anti-avoidance provision

[56] Counsel's submissions in this case raise directly the question of the difference between a purposive construction of specific tax provisions and Parliament's contemplation of how those provisions should be used. For there to be tax avoidance, the arrangement must fall outside the meaning of the provisions, construed in the light of their purpose, but inside the way in which Parliament contemplated they be used.

[57] Mr Cooper effectively submits that if the arrangement here is outside a purposive construction of the AIL regime, including the definition of associated person, then it is also outside the way in which Parliament contemplated the provisions be used. There is legalistic logic to this argument. And it resonates with the United Kingdom approach to anti-avoidance law and with the minority's judgment in *Ben Nevis.*[67] But it does not account for how the general anti-avoidance provision works at New Zealand law.

[58] The majority of the Supreme Court in *Ben Nevis* made clear that specific provisions of tax statutes are to be construed in the usual way: "primarily by their ordinary meaning, as established through their text in the light of their specific purpose", in accordance with s 5 of the Interpretation Act 1999.[68] That is the same way courts interpret any statute, as made clear by the Supreme Court in *Terminals (NZ) Ltd v Comptroller of Customs*.[69] I accept Mr Cooper's submission this is purposive interpretation in the usual way, not "literal" or "black letter" interpretation.[70] But the text of the statute remains at the heart of even purposive interpretation. As

67 *Ben Nevis*, above n 36, at [2] and footnotes 6 and 7.
68 At [103].
69 *Terminals (NZ) Ltd v Comptroller of Customs,* above n 41, at [39].
70 James Coleman *Tax Avoidance Law in New Zealand* (2nd ed, CCH, Auckland, 2013) at 76-77; Plaintiff's Closing, above n 8, at [28]–[29].

stated by the leading text, *Burrows and Carter Statute Law in New Zealand* cited by Mr Cooper, "[w]hatever the purpose of an Act may be, there is only so far one can 'stretch the meaning of the words' of the provision under consideration".[71] Judicial understanding of Parliament's purpose in enacting legislation informs, but does not substitute for, judicial interpretation of the words Parliament enacted.

[59] By contrast, the "parliamentary contemplation" stage of the s BG 1 tax avoidance inquiry is wider than simply a purposive interpretation of the text of specific provisions. The existence of s BG 1 reflects that "however carefully the general provision might be drafted, the results of taxpayers' ingenuity in adapting the forms in which they did business could not be predicted".[72] Parliament "must have envisaged" some circumstances in which the way a specific provision is deployed would "cross the line and turn what might otherwise have been a permissible arrangement into a tax avoidance arrangement".[73] This is why the Supreme Court rejected the taxpayers' argument in *Ben Nevis* that "once the ordinary meaning of a specific provision was satisfied there could be no tax avoidance".[74]

[60] The majority of the Supreme Court in *Ben Nevis* identified tax avoidance as occurring when use of a specific provision falls (a) within its ordinary meaning but (b) outside its intended scope in the overall scheme of the Act (and is more than merely incidental).[75] The Court unanimously reinforced that, in *Penny v Commissioner of Inland Revenue,* when it said "what the Act does require of taxpayers is that they should not structure their transactions with a more than merely incidental purpose of obtaining a tax advantage unless that advantage was in the contemplation of Parliament".[76]

[61] The effect is that, in order to prevent avoidance of the law by clever tax lawyers and accountants, Parliament has passed a general anti-avoidance provision. This empowers the judiciary to give more weight to Parliament's purpose, compared to text,

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71 R I Carter *Burrows and Carter Statute Law in New Zealand* (5th ed, LexisNexis, Wellington 2015) at 245.
72 *Ben Nevis,* above n 36, at [101].
73 At [104].
74 At [104] and footnote 113.
75 At [106]–[107].
76 *Penny v Commissioner of Inland Revenue*, above, n 50, at [49].

than it can under the Interpretation Act 1999 in interpreting a specific provision. The enactment of s BG 1 means arguments based only on the statutory text of specific provisions cannot answer the question of whether a taxpayer has avoided tax. This does not involve rewriting the specific provisions. It involves giving effect to s BG 1, with which they must work in tandem.

[62] Furthermore, it is important that it is the "use" of specific provisions which is compared with their purpose.[77] This is an "intensely factual" exercise,[78] focussing on how the taxpayer's arrangement has used, or deployed, the specific provisions including in terms of the variety of considerations stated in *Ben Nevis,* as outlined earlier.[79] Viewed objectively, in a commercially and economically realistic way, is that use consistent with Parliament's purpose or contemplation? Artificial and contrived structuring of an arrangement is a "classic indicator" it is not,[80] though whether the indicator is accurate will depend on the circumstances.

Was the use of specific provisions here within Parliamentary contemplation?

[63] As noted above, the parties agree the use of the AIL regime here, including the definition of "associated person", fell within the specific provisions of those regimes. So, was the way in which this arrangement used those specific provisions within Parliament's purpose and contemplation?

[64] There is no doubt the arrangement here involved highly complex and contrived ownership structures that would not be found in arms' length commercial relationships. But there is force in Mr Cooper's submission that a vendor-financed sale to a trust/holding company structure was common and commercially rational in non-arms' length commercial relationships involving private assets, so it should not be characterised as artificial when judged on an arms' length basis.[81] And, as I accepted above, it is common for a high net worth individual moving tax residence to seek to disestablish New Zealand tax residency and plan remittance of assets and

77 *Ben Nevis*, above n 36, at [109].
78 *Alesco*, above n 47, at [94].
79 See [34] above.
80 *Ben Nevis,* above n 36, at [108].
81 Plaintiff's Closing at [112]–[113], relying on expert evidence of Mr Hussey, Mr Brewer, Mr Choudhry and Mr Hagen.

income to the United Kingdom accordingly, which could involve using off-shore entities to hold assets. Such entities would not necessarily be arms' length. They are likely to be related. So artificiality and contrivance are not necessarily the reliable indicators of tax avoidance in these circumstances as they are in other circumstances.

[65] As Mr Cooper acknowledges, although Modena and Mayfair were intermediaries, Mr Watson was the ultimate lender. And it appears Mr Watson may not have been tax resident in New Zealand at the time, though I do not decide that. So, in this sense – in form – there may have been lending from a foreign lender to a New Zealand borrower, Cullen Group. But neither the lender nor the borrower were independent. Mr Watson had exchanged equity in CIL for debt owed by Cullen Group to Modena and Mayfair and, ultimately, back to him. As I found above, Mr Watson retained a determining level of control over Modena and Mayfair through the terms of the loans. And he retained a very high level of control over Cullen Group, through the trust ownership structure involving VEL, the Valley Trust, the Cullen Business Trust, CBTL and the Gulf Trust. That level of control is usually an incident of ownership of equity, rather than of debt. In reality, Mr Watson was on both sides of the loan transactions, instead of his previous position as a holder of equity. The ownership and debt relationships were structured in such as a way as to allow Mr Watson, through Cullen Group in New Zealand, to use the AIL regime to pay AIL at two per cent rather than NRWT at 15 per cent. Did Parliament contemplate that AIL rather than NRWT should be payable when the loan is between such highly related parties?

[66] As far as the text and scheme of the ITA is concerned, the AIL regime is clearly an alternative to NRWT. It is available to New Zealand borrowers, as approved issuers, who pay interest to non-residents. Under s NG 2(1)(b)(i) of the ITA, NRWT is set at zero for interest paid by an approved issuer in respect of a registered security "and derived by a person who is not an associated person of the approved issuer". The AIL regime was introduced in Budget Night amendments in the Finance (Revenue) Bill on 30 July 1991. The equivalent clause to s NG 2(1)(b) (s 311(1)(aa) of the Income Tax Act 1976) came into effect on 1 August 1991. In particular:

(a) The explanatory note about the clause which is the equivalent of s NG 2(1)(b) explains interest is zero-rated for NRWT "where the person

by whom the interest is derived and the person by whom it is paid are not related persons”.[82]

(b) The Minister of Finance and Revenue’s *Taxation Policy – Business Tax Policy* document of 30 July 1991 explained the problem that, in a deregulated interest rate environment, non-resident lenders expect an after-tax risk-adjusted rate of return equivalent to that in other jurisdictions.[83] They “will typically only lend to businesses in New Zealand if they are compensated for any withholding taxes applied to their interest income” by grossing up the interest paid by the resident borrower. That increases domestic interest rates and deters investment in New Zealand. The reform would place “increased downward pressure” on domestic interest rates, stimulate investment and growth and encourage residents currently evading or avoiding NRWT to pay AIL, reducing uncertainty and associated costs.[84] NRWT would continue to apply where the issuer and non-resident holder of the security are “associated parties” or “associated persons”.[85]

(c) Another document issued by the Ministers of Finance and Revenue on the same date, *Taxing Income Across International borders – A Policy Framework*, outlines the Government’s policy framework for considering international tax principles and objectives.[86] It provides more detailed analysis of how a tax on interest paid to non-residents can end up being borne by New Zealanders in higher interest charges.[87] But, if non-residents were not taxed, it gives examples of how a New Zealander could obtain the same treatment: by becoming a “tax exile”, ceasing to be a resident while still having New Zealand source income; remaining a resident but interposing a non-resident legal entity like a

82 Finance (Revenue) Bill 1991 (81-1) (explanatory note) at i.
83 Ruth Richardson and Wyatt Creech *Taxation Policy – Business Tax Policy 1991* (Ministers of Finance and Revenue, 30 July 1991) at 20.
84 At 21.
85 At 21 and 22.
86 *Taxing Income Across International Borders – A Policy Framework* (Ministers of Finance and Revenue, 30 July 1991) at 9. Referred to by the Minister of Revenue in introducing the Bill, (30 July 1991) 517 NZPD at 3289.
87 At 6-8.

company or trust not subject to New Zealand tax (such as "Island run-around" tax avoidance schemes), which would lead to substantial erosion of the New Zealand tax base; or divesting New Zealand based assets overseas.[88] The solution was seen to be a "robust regime for taxing residents on their foreign-source income", with low taxes on non-residents and without risking erosion of the tax base.[89] In addition to the introduction of the AIL regime, that meant proposed reforms to the Controlled Foreign Company and Foreign Investment Fund regimes.[90] The outline of the taxation of debt of non-residents, through the NRWT and AIL regimes, is similar to that in the first document.[91] It contained a separate analysis of taxation of equity supplied by non-residents, which required further work due to complications posed by the interaction with other countries' tax regimes.[92]

(d) The Associate Minister of Finance's contribution to the *Parliamentary Debates* discloses similar objectives of encouraging investment and growth in New Zealand by lessening pressure on domestic interest rates and stopping avoidance and evasion of NRWT by creating an exemption to it.[93]

[67] The s OD 7 definition of "associated person", used for the AIL regime, originated in s 5 of the Land and Income Tax Amendment Act (No 2) 1968. The Bill originally defined when persons were "at arm's length" but was changed to define instead "associated persons".[94] It was considered "arm's length" was a term better reserved to describe the nature of the transactions, whereas "associated persons" would describe the relationship between the parties.[95] Section OD 7 is the general definition of "associated persons". The definitions in s OD 8 are used for other specific tax regimes. The definitions are largely broader than s OD 7. I note that, in *Staithes*

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88 At 8–9.
89 At 9–10.
90 At 11-12.
91 At ch 3.
92 At 15–16.
93 (30 July 1991) 517 NZPD at 3293 (Hon Maurice McTigue).
94 Land and Income Tax Amendment Bill (No 2) 1968 (66-1), cl 5; Land and Income Tax Amendment Bill (No 2) 1968 (66-2), cl 5.
95 (19 November 1968) 358 NZPD 3196.

Drive Development Ltd v Commissioner of Inland Revenue, Edwards J considered the parties to a J G Russell arrangement were associated under the wider definition used in the Goods and Services Tax Act 1985.[96] Alternatively, if they were not, she considered the arrangement would fall within the general anti-avoidance provision in relation to GST, in s 76.[97]

[68] *Vinelight v Commissioner of Inland Revenue* was a tax avoidance case involving the AIL regime where trust structures were used to break the association between the relevant entities for the purposes of s OD 7. At first instance in the TRA, Judge Barber characterised the policy and purpose of the AIL regime as follows:[98]

> [316] The policy behind the AIL regime was to reduce the cost of overseas borrowing to New Zealand borrowers and was aimed at lenders who would typically only lend to New Zealand businesses if they were compensated for any withholding taxes which had to be paid: see *Taxation Policy – Business Tax Policy 1991* 30 July 1991. The policy paper continued on to state that, when the issuer and the non-resident holder of the security are associated parties, NRWT will continue to apply to the payment of interest. It was clearly not intended that associated parties be able to access the AIL regime.
>
> [317] The purpose of association rules is basically to identify common control and common ownership. Where there is that level of common control or ownership, then the concession is not intended to be available because it can be inferred, in that situation, the lending to the New Zealand borrower would have occurred in any case. There is no need to provide the same incentive sought by genuine third-party lenders. Parliament does not intend to extend the incentive where that arms-length aspect is missing, particularly, when the loan is already in place and, by necessary implication, was made in the knowledge that full NRWT would have to be paid.

[69] Judge Barber found the arrangement there had the purpose or effect of tax avoidance.[99] In dismissing the appeal in the High Court, Peters J quoted these paragraphs and was satisfied paragraph [316] identified the policy behind the AIL regime.[100] She was satisfied the taxpayer's use of s NG(2)(1)(b)(i) could not have been within Parliament's contemplation and purpose when it enacted the provision. On further appeal, in interpreting s NF 5 of the ITA (which is not at issue in this case), the Court of Appeal summarised the purpose of the AIL regime:[101]

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96 *Staithes Drive*, above n 60, at [84].
97 At [110].
98 *Vinelight* (*TRA*), above n 65, at [316]–[317].
99 At [327].
100 *Vinelight (HC),* above n 65, at [122]–[124].
101 *Vinelight (CA),* above n 53, at [34] (footnote omitted).

> … The objective of this regime, which remains in force, is that of encouraging investment in New Zealand by reducing the cost to taxpayers of borrowing offshore. Consistent with that objective, AIL is available only where lender and borrower are not associated persons as defined.

[70] In relation to tax avoidance, the Court of Appeal recorded a submission by the taxpayer that common control and ownership cannot be relied upon as evidence of avoidance because Parliament chose a less restrictive definition of "associated person" in s OD 7.[102] In finding there was tax avoidance, the Court stated:[103]

> As we have noted above, parliament enacted the NRWT and AIL rules to encourage investment in New Zealand. That was not the objective of the arrangement in this case. It is no sufficient answer to say that the arrangement otherwise complied with the letter of the tax laws.

[71] The Supreme Court declined an application for leave to appeal the Court of Appeal's judgment in *Vinelight* in relation to the time bar, the scope of the arrangement, and the Commissioner's reconstruction powers.[104] It was not satisfied it was necessary to hear and determine the proposed appeal in the interests of justice or, given the factual findings, that any matter of general or public importance was raised.[105]

[72] My view of what Parliament contemplated in enacting the AIL regime is based on the statutory text and scheme, the legislative history and the case law. I agree with the Court of Appeal, High Court and TRA in *Vinelight* that the objective of the AIL regime is to encourage investment in New Zealand by reducing the cost of New Zealand residents borrowing from non-residents. That is pursued by exempting from NRWT the interest paid by some New Zealand borrowers to non-residents; a cost which was typically borne by the borrowers due to international market pressures.

[73] The arrangement here replaced shares in a New Zealand company (CIL) with loans to another New Zealand company (Cullen Group), which were assigned to overseas entities in form (Modena and Mayfair), but not substance. Mr Watson retained a high degree of control over the relevant entities and was on both sides of

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102 At [61].
103 At [67].
104 *Vinelight Nominees Ltd v Commissioner of Inland Revenue* [2014] NZSC 74, (2014) 26 NZTC ¶21-076.
105 At [7].

the loans. I accept the expert evidence that no new funds were introduced into New Zealand.[106] Speculation about counterfactuals does not change that.[107]

[74] I consider the use of the AIL regime by this sort of arrangement, which would erode the tax base, was not within Parliament's contemplation or purpose. Cullen Group has not shown that it was. The success of Mr Watson and his advisers in bringing the arrangement within the terms of the specific AIL provisions does not mean Parliament contemplated that would or should occur. Viewed in light of the arrangement as a whole, Cullen Group has used the specific provisions in a way which cannot have been within the contemplation and purpose of Parliament when it enacted the provisions.

Issue 4: Was altering the incidence of tax a merely incidental purpose or effect?

Submissions

[75] Mr Cooper submits the Modena and Mayfair limb of the arrangement did not alter the incidence of tax. He submits that "one reason" for the restructure of CIL's ownership was ensuring Mr Watson no longer had a permanent place of abode in New Zealand and it was reasonable for him to take all reasonable steps to sever his direct, personal connection with CIL. He submits aspects of the 13 November 2002 transaction reflected prudent United Kingdom remittance and tax planning. He accepts Mr Watson's assignment of Loans A and B to Modena and Mayfair as conduits was not necessary for remittance planning purposes but submits it was prudent. He submits the structure adopted was reasonable taking into account Mr Watson's migration to the United Kingdom and the understanding of the law related to permanent place of abode at the time.[108] I treat this submission in the context of examining whether the incidence of tax was merely incidental.

[76] Ms Coumbe submits the arrangement here was contrived to ensure, and had the effect, that the only tax collected anywhere in relation to the interest was AIL at

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106 Hagen, above n 19, at [80]; Choudhry, above n 20, at [64]–[66]; Hussey Reply, above n 21, at [130].
107 *Alesco*, above n 47, at [38].
108 Plaintiff's Closing, above n 8, at [125]–[127].

two per cent. She submits payment of AIL rather than NRWT, must have been more than a merely incidental purpose or effect of the arrangement. She submits neither United Kingdom remittance planning nor tax residency was, objectively, a purpose or effect of the arrangement.

Merely incidental analysis

[77] First, it is clear the arrangement, viewed as a whole, used the specific provisions of the ITA and SCD to alter the incidence of tax. AIL was paid at a rate of two per cent, totalling $8 million, instead of NRWT being paid at a rate of 15 per cent which would have totalled $59.5 million. The incidence of tax was altered in the amount of $51.5 million. But was that alteration of the incidence of tax merely incidental?

[78] I accept one of the purposes of the restructuring of CIL's ownership, and of the arrangement, was to effect Mr Watson's migration to the United Kingdom. I accept Mr Watson may have cut links to New Zealand to do that, and that purpose may have led him to sell his shares in CIL; even though he retained other shares and he or his companies acquired (less valuable) shares in other New Zealand companies, Medical Holdings Ltd and Maintenance Ltd, as part of the arrangement. But any tax residency effect of selling his CIL shares would have been mitigated by the significant retention of control by Mr Watson through the arrangement. And selling CIL shares for this purpose did not require the complex structure set up in the arrangement, particularly the use of Modena and Mayfair.

[79] I also accept United Kingdom remittance planning was a consideration in aspects of the arrangement. Mr Watson could reasonably have been expected to want a source of "clean capital", typically located outside the United Kingdom, for United Kingdom remittance planning purposes. But this did not require conversion of the shareholder advance from Mr Watson to CIL, which was already clean capital, into Loan B. And the expert evidence is that the assignment to Modena and Mayfair was not required for United Kingdom tax purposes and, in some respects, posed added risks.[109] Perhaps remittance planning could reasonably have gone as far as

[109] Malcolm Gammie QC, Brief of Evidence, 3 September 2018 at [109]; NOE 187/18–188/5.

institutional segregation by assignment of Loan B to a separate entity.[110] But Modena and Mayfair played no independent role in remittance payments; those operating them simply did what they were told. And there was no risk of inadvertent remittance of tainted capital under Loan A because no remittances were intended to be, or were, made.[111]

[80] Even if all those points are accepted in the most favourable light for Cullen Group, I do not consider they demonstrate the arrangement's avoidance of NRWT by qualifying itself for AIL was merely incidental. Payment of AIL was a key element of Loans A and B. That was the intention, according to the Rose Memorandum.[112] It was the effect of the express terms of the loans which required Cullen Group to register each loan with the Commissioner and make the relevant AIL payment. That was not required by tax residency or United Kingdom remittance planning purposes. Yet it had the effect of avoiding $51.5 million of New Zealand tax. It was hardly "merely incidental"; Cullen Group has not demonstrated it was.

[81] Viewed objectively, I do not consider Cullen Group has demonstrated that altering the incidence of $51.5 million of tax was a purpose or effect of the arrangement here that was merely incidental. It is not one of the rare cases where tax avoidance was merely incidental. The amount of tax avoided and the integral nature of payment of AIL as a term of the relevant loans indicate tax avoidance was an end pursued in its own right.

Issue 5: Did the Commissioner lawfully counteract the tax advantage?

Law of counteracting a tax advantage obtained by avoidance

[82] If a tax avoidance arrangement exists, s BG 1(2) empowers the Commissioner to counteract the taxpayer's tax advantage under part G of the Act. In that part:

(a) Section GB 1 empowers the Commissioner to adjust the amounts of assessable income, deductions and available net losses, in the manner

110 Edward Powles, Brief of Evidence, 30 August 2018, [Powles] at [63]–[72]; and Brief of Evidence in Reply, 30 August 2018 at [7]–[8].
111 Rose Memorandum, above n 16 at [3.2(b)] and [4.1].
112 Rose Memorandum, above n 16, at [2.13], [2.18] and [4.3].

the Commissioner thinks appropriate, so as to counteract any tax advantage obtained by a person affected by an arrangement that is void under s BG 1.

(b) Section GB 1(1)(a) provides the Commissioner may, but is not required to, have regard to "such amounts of assessable income, deductions and available net losses as, in the Commissioner's opinion, that person would have, or might be expected to have, or would in all likelihood have, had if that arrangement had not been made or entered into".

[83] In *Alesco New Zealand Ltd v Commissioner of Inland Revenue*, the Court of Appeal characterised the Commissioner's discretion as "broad".[113] There, the Commissioner disallowed deductions for interest payments under a voided arrangement. The Court held the Commissioner "may have regard to" an alternative funding arrangement but is not bound to take that step "and nor should she be where the tax advantage can be counteracted simply by disallowing the impermissible deductions".[114] The Commissioner "is entitled to confine herself solely to negating the benefit enjoyed" by the taxpayer.[115]

[84] Here, the Commissioner counteracted Cullen Group's tax advantage by assessing for NRWT at 15 per cent, rather than AIL at two per cent. Mr Cooper makes three submissions about why that was impermissible, which are opposed by Ms Coumbe.

Does s GB 1 permit the Commissioner to assess NRWT liability?

[85] First, Mr Cooper submits s GB 1 does not permit the Commissioner to assess Cullen Group as if it were responsible to pay NRWT instead of AIL, because:

(a) imposition of NRWT is not an adjustment of income, deductions or net losses permitted by s GB 1;

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113 *Alesco*, above n 47, at [119].
114 At [123].
115 At [124].

(b) the NRWT regime is not concerned with income;

(c) the benefit lies with Modena and Mayfair, not Cullen Group, so no adjustment can be made against Cullen Group; and

(d) Modena and Mayfair would have benefited from receiving monies paid under the AIL regime but Cullen Group would be burdened with the tax liability.

[86] Ms Coumbe submits the Commissioner did not make an adjustment to the rate of NRWT and did not need to adjust the amount of non-resident withholding income or exercise her power under s GB 1. All she had to do was assess NRWT on Cullen Group's reported non-resident withholding income. Alternatively, if she did have to make an adjustment under s GB 1, Ms Coumbe submits the Commissioner was entitled to assess NRWT or to adjust gross non-resident withholding income from zero to the full amount of interest assessed.

[87] It is clear GB 1 empowers the Commissioner to make certain adjustments for the purpose of counteracting any tax advantage obtained by that person from or under a tax avoidance arrangement under s BG 1. The power does not have to be exercised, if the purpose of counteracting such a tax advantage can be achieved through a lawful assessment. Here, there is no doubt counteracting the tax advantage was the Commissioner's purpose. It is also clear the Commissioner's assessment of Cullen Group as liable to pay NRWT on the reported income, instead of AIL, did counteract the tax advantage. I consider she was entitled to do that. The arrangement was void by operation of s BG 1(1). The Commissioner was entitled to make her assessment on that basis, without exercising her discretion under s GB 1. If I am wrong, either of Ms Coumbe's alternatives would be available and would have the same effect.

Does a hypothetical counterfactual make a difference?

[88] Second, if Modena and Mayfair were not used, Mr Cooper submits Mr Watson would have loaned the money to fund the CIL share purchase directly to Cullen Group and the loans would still have been eligible for AIL rather than NRWT because Mr Watson was not "associated" with Cullen Group. Mr Cooper submits the

Commissioner's reconstruction needs to be consistent with that. Ms Coumbe submits the Commissioner did not reconstruct on that basis and was not required to do so.

[89] Ms Coumbe is correct. First, as I have just held, the Commissioner was not required to exercise her discretion under s GB 1. Second, there is no factual basis for suggesting "but for" the assignment, Mr Watson would have held the loan to Cullen Group. Rather, the evidence is that the assignment to Mayfair and Modena was an essential part of the arrangement.[116] Third, if the Commissioner did exercise her power and there was such evidence, it would be irrelevant at law because s GB 1(1)(a) only confers a discretion, and does not impose a requirement, on the Commissioner to have regard to a counterfactual of her own devising. Fourth, the proposed counterfactual arrangement would have a similar tax effect as the actual arrangement; it does not avoid the arrangement being avoidance.

Should NRWT have been payable at 10 per cent?

[90] Third, even if Cullen Group could not have qualified for AIL, Mr Cooper submits NRWT would have been payable at 10 per cent under art 12(2) of the Double Tax Agreement between New Zealand and the United Kingdom, so around $31.6 million of tax was avoided, not $51.5 million.

[91] As Ms Coumbe submits this is also based on the same counterfactual of loans going directly from Mr Watson to Cullen Group. The Double Tax Agreement with the United Kingdom did not apply to the interest actually paid by Modena and Mayfair in the Cayman Islands. It fails for the same four reasons.

Issue 6: Is the Commissioner's assessment time-barred?

Time bar law

[92] Section 108 of the TAA provides a four-year time bar on the Commissioner amending an assessment:

> **108 Time bar for amendment of income tax assessment**
>
> (1) Except as specified in this section or in section 108B, if—

116 NOE 9/27–10/13 (Gibson).

> (a) a taxpayer furnishes an income tax return and an assessment has been made; and
>
> (b) 4 years have passed from the end of the tax year in which the taxpayer provides the tax return,—
>
> the Commissioner may not amend the assessment so as to increase the amount assessed or decrease the amount of a net loss.

[93] In *Vinelight*, in relation to Resident Withholding Tax (RWT), the Court of Appeal questioned whether the time bar applies to NRWT, because the section allowing the Commissioner to assess for RWT expressly incorporates s 108 whereas the section which allows the Commissioner to assess for NRWT does not.[117] But, in any case, the Court held "[a] taxpayer which invokes the time bar against the Commissioner's RWT assessment must point to a return filed in the form prescribed for RWT".[118]

[94] Here, the Commissioner's assessment on or around 22 March 2010 was more than four years after the AIL paid by Cullen Group up to and including the return period ending 30 November 2004. Cullen Group filed the form required to accompany AIL, IR67A, but did not file an NRWT form.

[95] Mr Cooper wishes to submit that, if there is tax avoidance here, the Commissioner's assessments relating to the periods from 31 March 2003 to 30 November 2004 are time barred under s 108. The argument is that Form IR67A meets the requirement of the time bar. Mr Cooper acknowledges the Court of Appeal's decision in *Vinelight* requires me to find the Commissioner was able to issue assessments for NRWT and, because Cullen Group filed AIL returns, rather than NRWT returns, it cannot rely on a time bar. But Mr Cooper wishes to preserve his ability to argue that on appeal if required. The Commissioner agrees on the effect of *Vinelight*. The Commissioner wishes to argue that AIL returns are not income tax returns as required by s 108(1).

[96] I accept I am bound by the logic of the Court of Appeal in *Vinelight* to uphold the Commissioner's submission, as both parties accept. I do so. Because the issue

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117 *Vinelight (CA)*, above n 53, at [56].
118 At [57].

was not fully argued before me I do not express any further view on the arguments to be made on appeal.

Result

[97] I dismiss Cullen Group's challenge to the Commissioner's assessment of Cullen Group as liable for the $51,496,127.38 million of tax as assessed, plus use of money interest and penalties.

[98] Costs and disbursements should, prima facie, be awarded to the Commissioner. If they cannot be agreed, I give leave for: the Commissioner to file and serve submissions of no more than 10 pages within 15 working days of the date of this judgment; and Cullen Group to file submissions in reply of no more than 10 pages within 10 working days of that.

Palmer J